


July 8, 2011

MEMORANDUM FOR RECORD

SUBJECT: Initial Enforcement Investigation Report, **SPK-2011-00608**

1. *Information Reported to the Corps:*
 - a. Responsible Party(s)/Owner Name and Contact Information:
James and Kay Bianco

 - b. Affected Waters: East Inlet and wetlands abutting East Inlet.
 - c. Unauthorized Activities Reported: Email with photographs and map dated June 13, 2011 by Larry Gamble of Rocky Mountain National Park. The activity had been reported to the NPS on June 8, 2011 by adjacent landowner, John Schwartz. Mark McCutcheon of the NPS conducted an investigation of the area on June 10, 2011 and concluded that a rock dike had been built on the East Inlet and that an abutting wetland had been filled in with soil. U.S. Army Corps staff contacted Mr. Schwartz on June 21, 2011, who alleged that James and Kay Bianco had performed the subject work with heavy machinery and that they had additionally brought in fill material to elevate a 0.25 mile long by 12 foot wide easement they have across wetlands owned by Mr. Schwartz. The work is not ongoing. On June 29, 2011, the Biancos admitted to placing riprap in the East Inlet and using heavy machinery to grade wetlands abutting the East Inlet.
2. *Information Gathered from Office Sources:* ORM search revealed correspondence with the Biancos, relative to the subject property, assigned SPK-1997-75479. Correspondence occurred in 1991, 1997 and 1998 concerning Corps Regulatory authority and permit requirements. The Corps issued a discretionary authority determination on a NWP application due to the high quality of wetlands proposed for impact and area public interest review factors. No IP application was ever submitted by Biancos. The NRCS Web Soil Survey and historic aerials photos from Google Earth Pro were also reviewed.
3. *Project Information:* The work is located on the north bank of the East Inlet to Grand Lake, within the Town of Grand Lake, within Section 9, Township 9 North, Range 75 West, Latitude 40.2366°, Longitude -105.8021°, Grand County, Colorado. 3
4. *Information Obtained from Site Visit & Existing Environmental Setting:*
 - a. Jurisdiction – East Inlet and its associated wetlands provide surface contributions of hydrology to Grand Lake, a jurisdictional Waters of the U.S.
 - b. Site Details – On June 29, 2011, U.S. Army Corps of Engineers' staff conducted an investigation of approximately 2.5 acres. In May of 2011, approximately 0.75 acre of land had been cleared, disturbing approximately 6 inches of ground. Associated with these mechanized landclearing

activities, the investigation revealed dirt discharges in approximately 0.17 acres of palustrine shrub scrub wetland (from land leveling and a dirt berm constructed along the north bank of the East Inlet channel). During the same month, approximately 7 truckloads of cobble and small boulder material (~70 cubic yards) was used as riprap along approximately 120 linear feet of the north bank to the East Inlet, a perennial water. The identified waters of the U.S. are within a complex mosaic of upland and wetland ecotypes. In the immediate vicinity of the work area exist a perennial creek, open water habitat, lake shore, riparian wetlands, mixed conifer uplands, fens, willow carrs interspersed by private cabins, cottages, parking lots, and trails. A portion of the Rocky Mountain National Park is within the investigation area and was not disturbed. Please see attached Field Inspection Record, wetland determination forms, and photographs dated June 29, 2011.

5. *Elements of a Violation: Section 404*

a. Section 10

- ☐ Work in, under, or over navigable waters
- ☐ Without authorization or in violation of a Department of the Army permit

b. Section 404

- ☒ Discharge of
- ☒ Pollutants into
- ☒ Waters of the United States from a
- ☒ Point source by any
- ☒ Person
- ☒ Without authorization, exemption, or in violation of a Department of the Army permit

6. *Information Obtained from Alleged Violator:* U.S. Army Corps of Engineers' staff contacted Kay Bianco via telephone on June 22, 2011. She claimed that she had received two truckloads of rock from the Northern Colorado Water Conservancy District (NCWCD). She said that she and her husband had hired a contractor to install approximately 50 linear-feet of riprap along the East Inlet to Grand Lake. She could not recall the name of the contractor, but said that the work was performed with heavy equipment. She said that no other work was performed in wetlands or waterways. She said that ~ 300 dead trees, primarily beetle kill, were cut and removed from the area adjacent to the riprap area and may give the appearance of wetland fill, but that no fill occurred. Tree removal was necessary to abate the risk of fire. On June 29, 2011 staff met the Biancos at their residence (1170 Jordan Road). The Biancos claim that they had trees cut down and stumped and then had a separate contractor use heavy machinery to fill in and smooth out the stump holes and associated disturbance. They stated that they did not know the activity would be regulated and they would not provide the names of the contractors used. The Biancos said that NCWCD had indicated that the placement of riprap was necessary to prevent flood damage. This included the NCWCD stream gauge operator immediately upstream of the riprap who they said warned them that they needed to stabilize the bank before peak flow or would be subjected to significant flood damage. They indicated that they did not believe they needed a permit to perform the work and that the bank stabilization was critical in preventing flood damage to their property.

7. *Information Obtained from Local Resource Agencies:* On June 14, 2011, Msrs. Larry Gamble and Mark McCutcheon of the Rocky Mountain National Park Service reported the incident and supplied photographs and maps of the area to the U.S. Army Corps of Engineers. Please see the attached correspondence.

8. *Description of Findings and Impact Assessment:* Mechanized landclearing has resulted in the discharge of soil material into approximately 0.17 acres of wetlands. Additional discharges occurred along approximately 120 linear feet of perennial waterway, resulting in approximately 70 cubic yards of material below the ordinary high water mark. Impacts were estimated based on a Section F wetland delineation for atypical situations, historic aerials and ORM area calculation. Secondary impacts include the removal of wetland and upland vegetation on the disturbed site. Wetlands on the property serve a number of functions including, but not limited to, erosion protection, flood storage, water quality, and wildlife habitat. The disturbance did not significantly alter the hydrology of the area and will likely be colonized by hydrophytic species. The streambank berm and riprap fill could impact access of overbank flooding to the impacted floodplain area. This bank work has reportedly created flooding problems to at least one downstream property owner (Ms. Mills).
9. *Other:* The Biancos have offered to perform voluntary restoration to remedy the violation, including reseedling and planting the area. They have asked that the riprap be permitted to prevent serious jeopardy to life and property. Although the Biancos claim to have no knowledge of permit requirements, prior correspondence with the Biancos indicate they were familiar with the Corps Regulatory program. See attached letters dated February 11, 1991, December 16, 1997, and January 15, 1998 obtained from Corps file number 199775479. See also additional attached information provided to our office during the investigation by others, our notes and MFR of conversations.

10. *Recommendations for Resolution of Unauthorized Activity:*

- ☐ The **Corps** of Engineers should **retain** the case and resolve the unauthorized activity, as the completed work does not constitute an activity identified in Part III D.1 of the Enforcement MOA. Because this is not considered a major violation, it is recommended this be handled by this office and pursue [ACTION]

Tolling Agreement:

- ☐ Should be sent before After-the-Fact application is accepted.
- ☐ Should be sent with After-the-Fact jurisdiction determination.
- ☐ The Corps of Engineers will act as enforcement lead as activity is a **noncompliance of a Corps issued permit**.
- ☐ The Corps of Engineers will notify EPA that because of limited staff, resources, or [or what?] we will not take an action on a permit condition violation (see MOA Part III D.4).
- ☐ The Corps of Engineers has determined the completed work qualifies for **emergency procedures** pursuant to 33 CFR 325.2(e)(4). Work may continue subject to appropriate limitations and conditions as prescribed define these while the violation is being resolved.
- ☐ **Initial corrective measures** are required. As a result of the investigation, coordination, and preliminary evaluation of the case, initial corrective measures are required. In coordination with the EPA, USFWS, and other Federal, state, and local agencies, see 33 CFR 326.3(d)the responsible

party(s) is required to specify the measures required and time limits for completing this work [???] . Compliance with the order will not foreclose the Government's options to initiate appropriate legal action or to later require the submission of a permit application.

☐ An **After-the-Fact permit application should not be accepted** because [???]

☒ In accordance with the 1989 Corps-EPA Memorandum of Agreement concerning Federal enforcement for the Section 404 program of the Clean Water Act (MOA), the Corps of Engineers has determined the completed work does constitute an activity identified in Part III.D.1 of the MOA. Therefore, the EPA should accept the case and resolve the unauthorized activity. **Referral to EPA** is recommended because

☐ We have documentation showing that the responsible party is **repeat** violator of Section 404 of the Clean Water Act.

☒ The unauthorized activity is considered **flagrant** because the Biancos have documented prior knowledge that a section 404 permit is required for discharging dredged or fill material into waters of the United States(See SPK 1997-75479).

☐ **EPA requests this case.** Part III.D (Lead Enforcement Agency Selection) 1.c states the EPA will act as lead where **it requests a class of cases or a particular case.**

☐ We believe an **EPA administrative penalty** is warranted.

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USACE